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7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE DISTRICT OF ARIZONA
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10 Thomas D. Grabinski and Deanne) No. CV-04-1751-PHX-MHM
11 Grabinski, husband and wife,)
12 Plaintiffs,) **ORDER**
13 vs.)
14 National Union Fire Insurance Company))
15 of Pittsburgh, PA, a Pennsylvania)
16 corporation; Steven Kent, a single man,)
17 Defendants.)
18

19 On July 21, 2004, Plaintiffs Thomas D. and Deanne Grabinski filed a complaint (Doc.
20 1) against Defendants National Union Fire Insurance Company of Pittsburgh, PA, ("National
21 Union") and attorney Steven Kent in the Superior Court of Maricopa County, Arizona.
22 Defendants removed the case to this Court based on 28 U.S.C. § 1441, asserting jurisdiction
23 based on diversity of citizenship under 28 U.S.C. § 1332. Plaintiffs have asserted claims for
24 abuse of process (Count One) and continuing bad faith (Count Two). Plaintiffs' claim in
25 Count Three seeks an award of punitive damages. Defendants have filed a motion to dismiss
26 the complaint for failure to state a claim under Fed.R.Civ.P. 12(b)(6). (Doc. 6). Plaintiffs
27 have filed a response (Doc. 8) to Defendants' motion to dismiss, and Defendants have filed
28 a reply (Doc. 14). Defendants additionally have filed five requests that the Court take

1 judicial notice of certain state court proceedings and documents which they claim are
 2 relevant to the present litigation. (Doc. 7, 15, 17, 18 & 28). Defendants also have filed a
 3 motion for sanctions against Plaintiffs for filing the instant lawsuit which Defendants contend
 4 is frivolous. (Doc. 11).

5 The Court heard oral argument on the pending motions on April 11, 2005. At the
 6 hearing, Plaintiffs were directed to file a response to Defendants' motion for sanctions.
 7 Plaintiffs have filed their response (Doc. 31) and Defendants have filed a reply. (Doc. 33).
 8 The Court has reviewed the pleadings and documents on file and considered the parties'
 9 arguments and now enters this Order.

10 I.

11 **Defendants' Motion to Dismiss the Complaint**

12 (A) **The Complaint's Allegations.** Construed in the light most favorable to the
 13 Plaintiffs, the complaint alleges that Defendant National Union provided Plaintiff
 14 Thomas D. Grabinski, an officer at the Baptist Foundation of Arizona, with insurance
 15 coverage in the form of directors and officers liability policies. (Complaint ¶ 1)
 16 Plaintiffs allege that National Union refused to pay benefits owed to Mr. Grabinski
 17 under the policies resulting in Grabinski filing suit against National Union in a state
 18 court action filed in Maricopa County Superior Court, Cause No. CV 2002-005117.
 19 (*id.*, ¶ 2). Mr. Grabinski recovered a judgment against National Union in this state
 20 court civil action following a jury trial in February 2004. (*id.*, ¶ 4). Plaintiffs contend
 21 that it was determined, *inter alia*, that National Union was obligated to advance Mr.
 22 Grabinski's defense costs regarding pending criminal charges filed against him and
 23 that National Union had breached the contract of insurance. (*id.*). Plaintiffs further
 24 allege in the complaint that Defendants have abused the judicial process involving the
 25 state court litigation, contending in relevant part as follows:

26 6. Both before and after the jury trial National Union took
 27 willful actions in the use of judicial process for an ulterior
 28 purpose which was not proper in the regular conduct of the
 proceedings. National Union was primarily motivated by this
 improper intent which resulted in it abusing process by taking

actions which cannot be logically explained without reference to National Union's improper motives -- motives which caused National Union to utilize the procedures of the court process for its own purposes rather than any legitimate function reasonably justifiable in the litigation process. Indeed, National Union has used and [continues] to use its greater wealth and economic power to complicate and sustain expensive litigation in an attempt to beat Grabinski and his counsel into submitting to a settlement which is not justified or reasonable and to otherwise deprive Grabinski of funds he needs because he is *in extremis*.

8. National Union's and Steven Kent's actions have involved at least the following:

A. flouting orders of the court to pay Grabinski's defense costs as required by the insurance policies at issue;

B. deciding that Grabinski was guilty of the criminal charges against which National Union was supposed to defend and refusing to pay for Grabinski's defense while making the improper arguments that Grabinski was guilty in court notwithstanding the court's orders to the contrary;

C. conducting an improper deposition of Grabinski to incriminate Grabinski and aid the criminal prosecution;

D. filing a specious post-trial motion for new trial to delay payment of the judgment obtained against it in an attempt to leverage Grabinski;

E. filing a specious appeal when there is no reasonable basis for an appeal but solely for the purposes of, again, dragging matters out so that Grabinski will be forced to accept a compromise settlement; and

F. posting a *supersedeas* bond to stay execution of the judgment obtained against it, not for purposes of furthering its appeal but, indeed, simply to cause Grabinski increased delay, anxiety, frustration, demoralization and distress as it uses this device with others as a cudgel to bludgeon Grabinski into submission.

9. Steven Kent and National Union have committed the foregoing acts and continue to engage in the illegitimate use of court process willfully and with knowledge for ulterior motives, including their personal enrichment and economic well-being, in conscious disregard of the harm being caused to Grabinski and his wife. ...

(*id.*, ¶¶ 6, 8 & 9).

Plaintiffs further allege, based "upon information and belief," that National Union has a policy of abusing process such as in the instant circumstances "by using its greater

economic power as a lever to avoid its obligations." (*id.*, ¶ 11). Plaintiffs seek recovery of actual and punitive damages, costs and attorneys' fees.

(B) Relevant State Court Proceedings.

Defendants have requested that the Court take judicial notice of proceedings, documents and orders in state court actions allegedly relevant to Plaintiffs' allegations contained in the complaint. (Doc. 7, 15, 17, 18 & 28). These state court actions are Grabinski v. National Union Fire Ins. Co. of Pittsburgh, PA, et al., Cause No. CV 2002-005117, filed in Maricopa County Superior Court, and which is specifically referred to in the complaint by case number; State of Arizona v. William Pierre Crotts, et al., Cause No. CR 2002-018286, filed in Maricopa County Superior Court, which appears to be the criminal action in which Mr. Grabinski is a defendant; National Union Fire Ins. Co. of Pittsburgh, PA, et al. v. Grabinski, Case No. 1 CA-CV04-0290, Court of Appeals, State of Arizona, Division One; Grabinski v. Honorable Patrick Irvin, et al., Case No. CV-04-0311-SA, Supreme Court of the State of Arizona; and State of Arizona v. Crotts, et al., Case No. CR2001-006183, Maricopa County Superior Court, State of Arizona.

"A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed.R.Evid. 201(b). "A court shall take judicial notice if requested by a party and supplied with the necessary information." Fed.R.Evid. 201(d). The Court may take judicial notice "at any stage of the proceeding." Fed.R.Evid. 201(f). "Judicially noticed facts often consist of matters of public record, such as prior court proceedings .." Del Puerto Water District v. U.S. Bureau of Reclamation, 271 F. Supp. 2d 1224, 1232 (E.D.Cal. 2003). "Federal courts may 'take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to the matters at issue.'" *Id.*, (quoting U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992)). It may be appropriate to take judicial notice of another court's order, not for the truth of the matter asserted in the other litigation, but only for the limited purpose of

1 recognizing the judicial act that the order represents or the subject matter of the litigation.
2 See United States v. Jones, 29 F.3d 1549, 1553 (11th Cir. 1994).

3 The Court will take judicial notice as to the course of proceedings in the state court
4 cases cited above as relevant to a determination of Defendants' motion to dismiss.
5 Defendants' requests for judicial notice (Doc. 7, 15, 17, 18 & 28) are granted to the extent
6 that the Court will consider that certain state court proceedings and rulings have occurred.
7 Plaintiffs' objections (Doc.19) are overruled. Despite Plaintiffs' objections to certain of
8 Defendants' requests for judicial notice, Plaintiffs also have requested judicial notice of
9 various state court proceedings and documents in their response to the motion to dismiss
10 (Doc. 8, at n.1) and in their supplement to their response. (Doc. 24).¹ Plaintiffs additionally
11 have filed notice that on March 17, 2005, the Arizona Court of Appeals issued an opinion
12 affirming the verdict and judgment rendered in Cause No. CV 2002-005117. (Doc. 23).
13 Plaintiffs' requests for judicial notice are granted to the limited extent that the Court will
14 consider that such state court proceedings and rulings have occurred.

15 Based on the court documents of record, Mr. Grabinski successfully sued National
16 Union for bad faith and breach of contract in Maricopa County Superior Court, Cause No.
17 CV 2002-005117. Defendant Steven Kent was Defendant National Union's defense attorney
18 during the trial. Part of the allegations in the instant case involve Plaintiffs' contention that
19 at Mr. Grabinski's deposition and during the trial, Defendant Kent pursued lines of
20 questioning allegedly in an effort to portray Grabinski's activities as fraudulent, resulting in
21 certain rulings by the state trial court. The jury returned a verdict in favor of Mr. Grabinski.
22 The Superior Court entered a \$2.5 million judgment awarding Mr. Grabinski damages,
23 punitive damages, costs and attorneys' fees. (Superior Court Judgment at 2). Defendants
24 appealed, requested a stay of execution of the Judgment and posted a supersedeas bond.

25 Upon Defendant National Union's appeal, Plaintiffs sought in the trial court to

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27 ¹Plaintiffs have asked the Court to note that the petition for review filed in Crackel v.
28 Allstate, 92 P.3d 882 (Ariz.App. 2004), discussed *infra*, was denied by the Arizona Supreme Court.

1 disallow the posting of the bond and the stay of execution of the Judgment. (Superior Court
2 Order of May 3, 2004 at 1.) The trial court overruled Plaintiffs' objections (*id.* at 2), and
3 Plaintiffs appealed this ruling to the Arizona Court of Appeals. (Court of Appeals Decision
4 Order of June 24, 2004 at 1). The Arizona Court of Appeals remanded the matter to the trial
5 court for clarification of the nature of the jury's award. (*id.* at 1-2). The trial court confirmed
6 that the jury award in Cause No. CV 2002-005117 was for compensatory money damages
7 only and afforded no equitable relief. (Superior Court Minute Entry July 22, 2004).

8 On September 7, 2004, the Arizona Court of Appeals rejected Mr. Grabinski's special
9 action challenging the stay of execution and the posting of the supersedeas bond. Upon
10 petition, the Arizona Supreme Court did not accept jurisdiction of the matter.

11 As previously discussed, Plaintiffs have filed notice that on March 17, 2005, the
12 Arizona Court of Appeals issued an opinion affirming the verdict and judgment rendered in
13 Cause No. CV 2002-005117. Based on representations of counsel, Defendant National Union
14 has paid the judgment amount in full and the parties have reached a settlement on other
15 issues related to appellate fees and costs. (Doc. 32, at p. 11). As discussed in the opinion,
16 Mr. Grabinski and co-defendant Crotts have been indicted on criminal charges in Maricopa
17 County. According to Defendants' fourth judicial notice and information provided by
18 counsel, trial on the criminal charges has been scheduled. (Doc. 18; Doc. 32, p. 9).

19 (C) Standard of Review under Rule 12(b)(6).

20 When reviewing a motion to dismiss, the Court accepts the allegations in the
21 complaint as true and construes them in the light most favorable to the plaintiff. Sosa v.
22 Hiraoka, 920 F.2d 1451, 1455 (9th Cir. 1990). The Court must draw all reasonable
23 inferences in favor of the non-moving party. Salim v. Lee, 202 F. Supp.2d 1122, 1125
24 (C.D.Cal. 2002). Dismissal is proper "only if it appears beyond doubt that the plaintiff can
25 prove no set of facts in support of his claim which would entitle him to relief." Gibson v.
26 United States, 781 F.2d 1334, 1337 (9th Cir. 1986). "Dismissal can be based on the lack of
27 a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal
28 theory." Balistreri v. Pacifica Police Dep't., 901 F.2d 696, 699 (9th Cir. 1990). The Ninth

Circuit has stated that “[t]he issue is not whether a plaintiff’s success on the merits is likely but rather whether the claimant is entitled to proceed beyond the threshold in attempting to establish his claims.” De La Cruz v. Tormey, 582 F.2d 45, 48 (9th Cir. 1978). The Court must determine whether it appears to a certainty under existing law that no relief can be granted under any set of facts that might be proved in support of plaintiff’s claims. Id. Review of the facts under a Rule 12(b)(6) motion is normally limited to those presented within the four corners of the complaint and to documents attached thereto or incorporated therein by reference; however, the Court may also look to public records in deciding such a motion. Taylor v. Vermont Dep’t of Educ., 313 F.3d 768, 776 (2d Cir. 2002).

(D) Discussion.

1. Plaintiffs' abuse of process claim in Count One. Plaintiffs allege with respect to Count One that "defendants are liable to the plaintiffs for abuse of process." (Complaint, ¶ 13). In light of the other allegations set forth in the complaint, Plaintiffs contend that their abuse of process claim involves actions taken by Defendants at various stages of the state court litigation in Cause No. CV 2002-005117. Plaintiffs contend that Defendants filed specious post-trial motions, filed a specious appeal, posted a supersedeas bond to cause increased delay and conducted an improper deposition and questioning at trial seeking to implicate Mr. Grabinski's guilt in the criminal charges. Plaintiffs allege that Defendants pursued these actions with an ulterior motive, that is, for their own greed, and to cause Mr. Grabinski to submit to a settlement. Defendants have moved to dismiss Count One for failure to state a claim for relief, contending that Plaintiffs' allegations are factually deficient to state a claim for abuse of process.

Under Arizona law, the elements of an abuse of process claim are (1) a willful act in the use of judicial process (2) for an ulterior purpose not proper in the regular conduct of the proceeding. Crackel v. Allstate Ins. Co., 92 P.3d 882, 887 (Ariz.App. 2004)(quoting Nienstedt v. Wetzel, 651 P.2d 876, 881 (Ariz App.1982)). In Arizona, "process" has been

1 interpreted as "encompassing the entire range of procedures incident to the litigation
2 process." Id. at 880. As the Arizona Court of Appeals explained in Nienstedt,

3 Arizona case law recognizes that the gist of the tort is the
4 misuse of process, justified in itself, for an end other than that
5 which it was designed to accomplish. Rondelli v. County of
6 Pima, [586 P.2d 1295 (Ariz. App. 1978)]; *see also*, Prosser, The
7 Law of Torts, § 121 (4th ed. 1971). It is immaterial that the
8 process may have been properly obtained or issued as a normal
9 incident of the litigation involved. It is the subsequent misuse
10 which constitutes the misconduct for which liability is imposed.
11 *See* Restatement (Second) of Torts § 682, Comment (a) (1977).
12 On the other hand, the authorities recognize that there is no
13 liability when the defendant has done nothing more than
14 legitimately utilize the process for its authorized purposes, even
15 though with bad intentions. *See generally*, Prosser, Law of
16 Torts, § 121, p. 857 (4th ed. 1971). This same concept is implied
17 in the Restatement's § 682's use of the word 'primarily,' which is
18 explained in Comment (b):

19 'b. "Primarily." The significance of this word is
20 that there is no action for abuse of process when
21 the process is used for the purpose for which it is
22 intended, but there is an incidental motive of spite
23 or an ulterior purpose of benefit to the defendant.'

24 Id., at 881.

25 It is not enough to establish a defendant's ulterior purpose in the use of process, since
26 some goals, like a purpose of settlement, are "includable in the goals of proper process." Bird
27 v. Rothman, 627 P.2d 1097, 1100 (Ariz. App. 1981). Rather, the process must be used
28 "primarily to accomplish a purpose for which [it] was not designed." Nienstedt, 651 P.2d
at 881. Under this view, the "action for abuse of process assumes an ulterior motive, usually
extortionate in nature." Pankratz v. Willis, 744 P.2d 1182, 1196 (Ariz. App. 1987)(quoting
W. Prosser, Law of Torts § 121, 857-58 (4th ed. 1971)). To sustain an abuse of process
action, the claimant must show that the use of process "could not logically be explained
without reference to . . . improper motives." Crackel, 92 P.3d at 888-89. Mere speculation
about the defendant's purposes provides no foundation for an abuse of process claim. Id.
Similarly, a simple showing that one party was aware that his actions would subject the
opposing party to additional legal expenses will not sustain an abuse of process claim if the
primary goal of the process is lawful. Nienstedt, 651 P.2d at 882. "Where a lawful end is

1 pursued by appropriate process, incidental motives of spite or greed are not actionable.”
2 Pankratz, 744 P.2d at 1196.

3 Plaintiffs contend that their abuse of process claim is cognizable based on Crackel v.
4 Allstate Insurance Company, *supra*. Plaintiffs in Crackel contended that Defendant Allstate
5 had abused several court processes based on, *inter alia*, asserting an unfounded contributory
6 negligence defense, serving an offer of judgment that did not come close to reflecting the
7 plaintiffs' medical costs, appealing an arbitration award even though the adjustor had
8 characterized the award as reasonable, and engaging in misconduct at the mandatory
9 settlement conference. A jury returned a verdict in favor of plaintiffs. On the parties' cross-
10 appeals, the Arizona Court of Appeals concluded that a reasonable jury could have found that
11 the conduct of Allstate's attorney during the mandatory settlement conference, standing
12 alone, constituted an abuse of a specific court process and that counsel's behavior could not
13 be justified as reasonable trial strategy. This conduct included providing an incomplete
14 settlement memorandum, refusing to participate in the court's efforts to encourage nontrial
15 resolution, and misrepresenting the conclusions of Allstate's expert on whether it had been
16 reasonable for one of the plaintiffs to seek medical attention. The trial court in the underlying
17 litigation had sanctioned Allstate for not participating in good faith negotiations. *Id.*, at 892-
18 94.

19 Plaintiffs' allegation in the instant case that Defendants' reason for appeal was to
20 force a settlement will not support an abuse of process claim under Arizona law, even if the
21 allegation is assumed to be true. Bird, 627 P.2d at 1100. Although Plaintiffs allege that
22 Defendants were aware that the costs of appeal would work a financial hardship on them, an
23 opposing party's awareness that its actions will increase legal costs is insufficient grounds
24 for an abuse of process claim where the primary goal of the process appears lawful.
25 Nienstedt, 651 P.2d at 882. Plaintiffs' other allegations that Defendants "flouted orders,"
26 improperly questioned Mr. Grabinski during depositions and at trial, filed "specious" post-
27 trial motions and a "specious" appeal, and posted a supersedeas bond, are insufficient to
28 support their abuse of process claim. Plaintiffs have not asserted any factual basis in their

1 complaint for their allegation that Defendants' actions were "willful" "in the use of judicial
2 process for an ulterior purpose." Allegations of "incidental motives of spite or greed" are
3 insufficient. Mere speculation concerning a defendant's ulterior motive cannot sustain an
4 abuse of process claim. See Crackel, 92 P.3d at 888-89. As observed in Crackel, a plaintiff
5 must show that an "alleged improper purpose was [the] primary motivation for ...the process
6 [used] and that the improper purpose was not merely an incidental and collateral motivation."
7 Id., at 891. For the reasons discussed, Plaintiffs' abuse of process claim fails to state a claim
8 for relief. Defendants' motion to dismiss Count One is granted.

9 2. Plaintiffs' continuing bad faith claim in Count Two.

10 Plaintiffs allege in Count Two simply that "defendants are liable for continuing bad
11 faith." (Complaint, ¶ 14). This claim appears to be premised on Plaintiffs' allegation at the
12 time that Defendants had refused to pay Plaintiff Grabinski the sum awarded as a result of
13 the jury verdict in the state court trial, Cause No. CV 2002-005117. Plaintiffs rely on Kyriss
14 v. Aetna Life & Casualty Co., 624 F.Supp. 1130 (D.Mont. 1986), in support of their
15 contention that they have asserted a cognizable claim for relief. Plaintiffs have not satisfied
16 this Court that their allegations state a claim for relief under Arizona law based on the
17 circumstances presented here. Moreover, Plaintiffs' "continuing bad faith" claim appears to
18 be subsumed within their abuse of process claim which has been found to be legally
19 insufficient.

20 3. Plaintiffs' claim for punitive damages in Count Three.

21 Plaintiffs contend in Count Three that "defendants are liable for punitive damages."
22 (Complaint, ¶ 15). A request for punitive damages does not state a separate claim for relief
23 under Arizona law. Sisemore v. Farmers Ins. Company of Arizona, 779 P.2d 1303, 1306
24 (Ariz.App. 1989).

25 4. Whether Plaintiffs should be permitted to file an amended complaint.

26 When granting a motion to dismiss, a court is generally required to grant a plaintiff
27 leave to amend unless the amendment would be futile. Cook, Perkiss & Liehe, Inc. v.
28 N.Cal.Collection Serv. Inc., 911 F.2d 242, 246-47 (9th Cir. 1990). In determining whether

1 amendment would be futile, a court examines whether the complaint could be amended to
2 cure the defect requiring dismissal "without contradicting any of the allegations of [the]
3 original complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).

4 The Court concludes that the complaint does not appear to be susceptible to
5 amendment such that a viable claim for abuse of process or "continuing bad faith" can be
6 asserted against Defendants. Plaintiffs' claims asserted in Counts One and Two are dismissed
7 with prejudice.

8 II.

9 Defendants' Motion for Sanctions

10 A court may impose sanctions under Rule 11 when an attorney files a pleading that
11 is not well grounded in fact or warranted by law. Fed.R.Civ.P. 11(c). Rule 11(b) provides
12 that claims in a complaint must have evidentiary support or must be likely to have
13 evidentiary support based on further investigation or discovery, must be warranted by
14 existing law or nonfrivolous, and must not be presented for an improper purpose such as to
15 harass or cause unnecessary delay or needless increase in litigation costs. The standard for
16 determining which arguments or claims are nonfrivolous is that of a competent attorney
17 admitted to practice before the court. G.C. and K.B. Investments, Inc. v. Wilson, 326 F.3d
18 1096, 1109 (9th Cir. 2003).

19 In applying Rule 11, courts must keep in mind two competing considerations. United
20 Nat. Ins. Co. v. R & D Latex Corp., 242 F.3d 1102, 1115 (9th Cir. 2001). Rule 11 must be
21 used in such a way as to discourage use of "litigation tactics [that are] so vexatious as to be
22 unjustifiable . . . and that neither the other parties nor the courts should have to abide such
23 behavior or waste time and money coping with it." Id. The court must also ensure that its
24 use of Rule 11 does not diminish the effectiveness of our adversary system by deterring
25 lawyers from the "vigorous representation of their clients." United Nat. Ins., 242 F.3d at
26 1115

27 In their separate motion for sanctions, Defendants contend that sanctions should be
28 imposed against Plaintiffs because the claims asserted have no basis in law and the instant

1 action was filed to circumvent the state appellate process and to force Defendants to pay the
2 jury award. The parties have filed approximately 40 pages of briefing on the issue of
3 sanctions. While the Court has found that Plaintiffs' allegations fail to state cognizable claims
4 for relief, the Court does not conclude that the claims were frivolous. Defendants' motion
5 for sanctions is denied.

6 **Accordingly,**

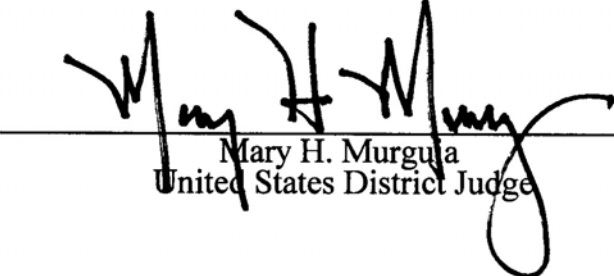
7 **IT IS ORDERED** that Defendants' motion to dismiss the complaint (Doc. 6) is
8 granted.

9 **IT IS FURTHER ORDERED** that Defendants' motion for Rule 11 sanctions (Doc.
10 11) is denied.

11 **IT IS FURTHER ORDERED** that Plaintiffs' complaint and action are dismissed
12 with prejudice.

13 DATED this 23rd day of September, 2005.

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Mary H. Murgula
United States District Judge